No. 17458

United States Court of Appeals

for the Ninth Circuit.

MARY M. BEHRENS,

Appellant,

v

UNITED STATES OF AMERICA, WILDA L. DINNELL,

Appellees.

BRIEF OF APPELLEE
WILDA L. DINNELL.

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I

STATEMENT OF PLEADINGS AND FACTS, SHOWING COURT'S JURISDICTION

Counsel for appellee has read the Statement of Pleadings and Facts showing Court's jurisdiction which is found on pages 1 and 2 of Appellant's Opening Brief and

believes that it fairly covers the situation. Hence, nothing will be added to same.

II

STATEMENT OF THE CASE

A. Reason for Appellee Presenting own Statement of Case.

Counsel for appellee may present his or her own statement of the case under Rule 18.3 of United States Court of Appeals which provides that appellee may present his or her own statement of the case where the appellant's statement of the case is controverted. Counsel for appellant states on page 2 of the Brief that Appellee Dinnell claims to be the beneficiary on the grounds of the intent of the serviceman. Likewise, on page 3 of Appellant's Brief, it is stated that the trial court concluded that the serviceman intended to change the beneficiary and that such intention alone is sufficient under the law to accomplish a change of beneficiary.

It is respectfully submitted that the record in this case indicates clearly that the trial court based its decision not only on intent alone, but also on the fact that the serviceman made an overt act. In its order for judgment, the trial court pointed out that the serviceman

intended that appellee receive the entire proceeds and that he "manifested this intention by executing DD Form 93 on October 25, 1954, wherein he listed her as beneficiary for 100% of his insurance". [Lines 29 to 31 on page 1]. This clearly was an overt act. Likewise, the trial court found in paragraph 3 of its Findings [commencing on line 30 of page 2, and continuing to line 4 on page 3]:

> "that said Henry Dinnell thereafter changed the beneficiary on said policy from said Mary M. Dinnell to defendant Wilda L. Dinnell; that particularly on October 25, 1954, the said Henry Dinnell did sign a DD Form 93, Record of Emergency Data, provided by Public Law 23, 82nd Congress, designating said defendant Wilda L. Dinnell as beneficiary for 100% of the proceeds under said policy;".

Clearly, this was an overt act.

B. Appellee's Statement of the Case.

This is an action involving the disposition of proceeds of a deceased serviceman's policy of National Service Life Insurance. The appellant herein was the original beneficiary under Policy No. V1426-22-92, National Service Life Insurance, and the holder of said

policy. Appellee, Wilda Dinnell, claims as beneficiary thereunder on grounds of not only the intent, but also the overt act of the deceased serviceman.

The sole question involved is whether there was accomplished a change of beneficiary of said policy of National Service Life Insurance.

The entire record of the serviceman in the hands of the Veterans Adminstration was presented, by stipulation, to the Court, and no other factual or evidentiary evidence was taken. The trial court concluded from the record (the entirety thereof being raised and presented to the Appellate Court) that Appellee is the beneficiary both by his express intent and by his express overt act.

III

ARGUMENT

A.

FACTS

The serviceman in this case was married three times. He was issued a $10,000.00 National Service Life Insurance policy effective April 1, 1942, naming his first wife, Lillian Thelma Dinnell, as principal beneficiary. On November 17, 1943, he changed the beneficiary, naming his son and daughter as co-beneficiaries for $5,000.00 each. On October 29, 1945, the serviceman changed the beneficiaries

naming the appellant, his then wife, as principal beneficiary. Intermediate changes of beneficiaries, not important here, were made, but on January 9, 1951, the serviceman named the appellant as principal beneficiary. His insurance was renewed effective April 1, 1955, for another five-year period, and remained in full force and effect until the serviceman's death.

The record shows that on October 25, 1954, the serviceman signed a DD Form 93 which was witnessed by Staff Sergeant Charles J. Thomas, Jr. The serviceman indicated thereon that appellee was his wife and he named her as beneficiary for benefits administered by the Service Department. Item 21 of this form is entitled "Designation or Change of Beneficiary - Serviceman's Indemnity (Pl. 23, 82d Cong.)" and contains a notation "(Does not operate as a designation or change of beneficiary of any insurance contracts issued by United States Government)". In the space provided therein for the naming of the beneficiary, the serviceman named the appellee, Wilda L. Dinnell, as beneficiary for 100% and his mother, Louise Dinnell, as beneficiary for 100%. Subsequently, the Veterams Administration received the following statement (a part of the record on appeal) dated May 21, 1958, from said Staff Sergeant Charles J. Thomas, Jr.:

> "To the best of my knowledge, belief and memory, on 25 October, 1954, when I witnessed the DD Form 93 executed by M/Sgt. Dinnell, he was fully aware that he had $10,000. insurance and that he knew that he was designating his wife, Wilda L. Dinnell, as his primary beneficiary and his mother, Louise Dinnell as contingent beneficiary".

The record further shows that appellee submitted photocopies of the Department of Defense Bulletin and a DD Form 93 signed by the serviceman on January 5, 1953, and letters which appellee stated were written to her by the serviceman on November 1, December 8, December 13 and December 28, 1956, reflecting his love and affection for her. In the serviceman's letter of November 1, he stated that he would have to start paying for his insurance and that there was to be "no more free insurance". In his letter of December 8, the serviceman advised appellee: "I applied for my new insurance today". In his letter of December 13, the serviceman wrote: "I guess I told you before but I sent my insurance in Saturday, so I am sending you a copy of the new Survivors Benefits and this new deal is better than insurance, but I'll have <u>both</u> so baby if something does happen to me you will be sitting on easy St. You will be getting money from 4 sources . . . and that should take care of my baby." (Emphasis added).

In his letter of December 28, the serviceman stated: "I haven't heard from my insurance yet so I don't know how much it will be."

The Service Department "Special Bulletin" lists the four benefits granted under the "Servicemen's and Veterans Survivor Benefits Act" which was effective January 1, 1957, as (1) death gratuity, (2) social security, (3) compensation and indemnity, (4) insurance, and gives a brief description of these benefits. Under the heading "New Information" relating to insurance on the reverse side of the form printed material therein reads:

> "By resuming full payment of premiums which have been under waiver a serviceman's survivors will not only be eligible for the more liberal benefits under the new law, but will also be entitled to the full proceeds of his insurance policy."

After this sentence the handprinted notation apparently made by insured reads: "me or you". Printed material on the form referring to servicemen who never had service life insurance or who allowed insurance to expire is obliterated and the handprinted notation appears: "not me". In another paragraph the bulletin reads:

> "In view of the loss in survivors benefits which may result in an individual's failure to cancel the waiver of premium prior to May 1, 1957, it is important that each member give

> serious thought to the cancellation of such waiver, and, also, the continuation of his service life insurance."

Immediately after this sentence, the handprinted notation appears: "I did, the only thing on $10,000 will cost me about $21.00 per month starting Jan. 57." Another paragraph in the Bulletin, referring to servicemen who allowed Government insurance to expire, reads:

> "If you are one of these, remember that the $10,000 indemnity or 'free insurance' is cancelled after December 31, 1956. It may be wise for you to take out a new service policy to take its place."

And, the handprinted words by the insured reads: "I did."

The record shows that in a letter from the appellee dated August 21, 1957, directed to the Veterans Administration, she stated that in the period during which the above letters were written to her from the serviceman, "he believed his insurance was made in my favor and I also believed that the DD Form 93 he signed in January 1953 was accomplishing this purpose"; that at the time the DD Form 93 was signed, she and her husband discussed the mode of settlement and they agreed she was to receive $100.00 per month from the insurance. Appellee also alleged that the notations made by her husband on the Service Department Bulletin indicated that she was to be the beneficiary

doubt as to his desire or his intent for me to have the insurance."

The record also shows that the serviceman on April 10, 1956, signed a DD Form 93. Item 10 of the latter form provides a space for the naming of beneficiaries for Serviceman's Indemnity purposes and contains substantially similar printed instructions as to its nonapplicability to Government life insurance as to the DD Form 93 of October 25, 1954. In the space provided for the naming of beneficiaries, the typed notation appears: "N/A NSLI".

On page 5 of Appellant's Brief, counsel for appellant states that the serviceman specifically wrote the foregoing notation on the form. It is respectfully submitted that there is nothing in the record whatsoever that the serviceman did this. In all fairness, all that can be said is that it may have been typed in by either the serviceman or the officer who witnessed the execution of the document, one Gilbert E. Haynes. But, as the Government indicated on page 8 of its Memorandum, the notation "N/A-NSLI" apparently intended to show that Servicemen's Indemnity was not applicable since the serviceman had National Service Life Insurance in force.

B.

POINTS AND AUTHORITIES

The law seems to be well-settled to the effect that in order to effectuate a change of beneficiary, there must be both (1) intent and (2) an overt act. The Court of Appeals for the Ninth Circuit stated in Kendig v Kendig, 170 Fed. 2d 750:

> "In cases involving a change of beneficiary under War Risk insurance policies, the courts have striven to effectuate the manifest intention of the insured, provided always he has taken some affirmative action evidencing an exercise of the right to change. There have been differences of opinion only as to the degree or nature of the action necessary to effect the substitution. Strict compliance with the administrative regulations are not exacted." (Emphasis added).

The law is well settled that a written instrument used to effectuate a charge of beneficiary need not be in any particular form. [Moths v United States, 179 Fed. 2d 824 (7th Cir.); Cohn v Cohn, 171 Fed. 2d 828 (D.C. Cir.); and Bratcher v United States, 205 Fed. 2d, 953 (8th Cir.)]

In the case of United States v Smith, 159 F. Supp. 741 (S.D. N.Y.), the court had before it the effect of a DD Form 93. On this form the insured had named the beneficiary for Servicemen's Indemnity, although he had

no such coverage. The court found that the insured had effectuated a change of beneficiary for his insurance. To the same effect [also see Pierce v United States, (M.D. ALA), Civil No. 432-E.]

A similar situation was presented in the case of Staubach v V.A. (E.D. KY.). In the Staubach case, the insured used a DD Form 93-1. He named a beneficiary for Servicemen's Indemnity, although he had no such coverage. The court held that the insured had effectuated a change of beneficiary for his insurance.

We have no quarrel with that portion of the decision in Hawkins v Hawkins, 271 Fed. 2d 870, which counsel quoted from and set forth on pages 9 and 10 of Appellant's Brief. However, we should like to point out that a careful reading of the Hawkins case indicates that when the intent and act are present, the fact that the prescribed form is not used is immaterial.

We would direct this Honorable Court's attention to two cases referred to in the Hawkins case. The first one is found on page 873, et. seq., wherein it is referred to in the following manner:

> "In the next case, decided the same month, McKewen v McKewen, 5 Cir., 165 F. 2d, 761, 765, this Court placed its decision affirming a judgment finding a change from a mother to a later acquired wife on the basis

that the three official Army documents in which the officer stated that his wife was named as the beneficiary actually constituted the requisite notice to the Veterans Administrations, <u>although none of them was in form a request to change the beneficiary.</u> The Court quoted from and approved the holding in the Mitchell case but also said:

> 'The intention, desire, and purpose of the soldier should, if it can reasonably be done, be given effect by the Court, and substance rather than form should be the basis of the decision where, as here, the soldier's intention to name his wife as beneficiary is evidenced by official documents executed by the soldier and delivered to the insurer. His wishes should not be thwarted by the fact <u>that proof of the use of the prescribed forms for accomplishing his intent was not available.</u> White v United States, 270 U.S. 175, 46 S. Ct. 274, 70 L. Ed. 530, Cf. Claffy v Forbes, D.C. 280 F. 233; Roberts v United States, 4 Cir., 157 F. 2d 906.'" (Emphasis added).

The second case is found on Page 874 of the <u>Hawkins</u> decision which counsel for the appellant cited is referred to in the following words:

> "This case was almost immediately followed by the case of Gann v Meek, 5 Cir., 165 F. 2d 857,

> in which the Court, one judge dissenting, affirmed the judgment of the trial court which found that a change in beneficiary had been accomplished. This finding was based on a letter of the deceased to his brother in which the serviceman said: "I did change my insurance if anyone gets it Mom will get it all." The only other evidence was testimony from another serviceman who testified that in combat conditions existing at Saipan, where the insured was killed, mails were occasionally lost. The court accepted the <u>letter</u> as evidence of the intent to change and as proof that the necessary steps had been taken, including the written request to the Veterans Administration, although there was no other proof of his having done so." (Emphasis added)

It is to be noted that in the preceding case the Court accepted a letter as evidence of the intent to change. In the instant case, the evidence showed that the serviceman went before an Army sergeant and signed the DD Form 93. In addition to the signature on the form, we have the positive testimony by a disinterested witness to the effect that the serviceman intended to designate Appellee as his primary beneficiary. Certainly, the stature of the foregoing testimony is more formidable than a letter. Moreover, in the instant case, we have letters and bulletins heretofore referred to.

We respectfully submit that the foregoing two cases referred to in the Hawkins decision followed the law that where intent and act are shown, the fact that the proper form has not been used is immaterial.

Applying the foregoing principles to the instant case, we respectfully submit that both intent and act on the part of the serviceman to name appellee as beneficiary were clearly established, although concededly the proper form was not used.

The intent was established by the letters to appellee from the serviceman, which letters included various bulletins, Governmental bulletins, etc. All of these are a part of the record. The overt act was established by the testimony of the disinterested witness, S/Sgt. Charles J. Thomas, Jr.

Appellee therefore respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted this 10th day of November, 1961.

SUMMERS & WATSON and JOHN SAID

BY: JOHN SAID

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Wilda L. Dinnell

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